EARTHJUSTICE

January 20, 2021
Via Email sawyers.andrew@epa.gov

Andrew Sawyers, Director
Office of Water
Environmental Protection Agency (EPA)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Request for Expedited Action; Ctr. for Biological Diversity, et al., v. Wheeler, No. 1:21-cv-119-RDM (D.D.C. Jan. 14, 2021)

Dear Director Sawyers:

On January 14, 2021, the Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Conservancy of Southwest Florida, Florida Wildlife Federation, Miami Waterkeeper, and St. Johns Riverkeeper (collectively, the "Plaintiffs") initiated this litigation to challenge EPA's recent approval of the state of Florida's application to administer a Clean Water Act Section 404 permitting program. 33 U.S.C. § 1344(g)–(h). (See Exhibit 1 (Complaint).) EPA transferred authority to administer Section 404 to the state without giving the state program legal effect by claiming the approval was an "adjudication" rather than a rule, and failing to codify the program. The Administrative Procedure Act ("APA") grants EPA authority to "postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. We respectfully request that EPA recognize that the transfer of authority was not lawful or, alternatively, if EPA lawfully promulgates a rule approving and codifying the state program, that the agency postpone its effective date.

EPA's approval of Florida's program represents a significant and unlawful departure from longstanding policy and practice. The decision has national implications, as Administrator Andrew Wheeler encouraged other states to follow this model when he announced the decision.[1] First, it relies on an unlawful programmatic biological opinion and incidental take statement authorizing an unknown amount of take for an unknown number of endangered species, while extending protection from liability to the state and state permittees, all by relying on a patently deficient and unenforceable technical assistance process not authorized by Congress. Second, it authorizes a program that shields an entire class of violations from criminal liability by imposing a higher mens rea standard than the negligence standard required by the Clean Water Act.[2]

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[1] U.S. Envtl. Prot. Agency, EPA Approves Florida's Request to Administer the Clean Water Act Section 404 Program, YouTube (Dec. 17, 2020), https://youtu.be/QLUr-sMRRmo.

[2] The Court of Appeals for the Ninth Circuit recently held that EPA abused its discretion approving a state program on this basis alone. See Idaho Conservation League v. U.S. Envtl. Prot. Agency, 820 F. App'x 627 (9th Cir. 2020). Florida's program suffers a number of other deficiencies as articulated in the complaint, including by asserting jurisdiction over an unprecedented, and unlawful, breadth of waters based on unsupported changes to the Corps' retained waters list. 33 C.F.R. §§ 329.14, 329.16.

If expedited relief is not granted, Plaintiffs in the pending litigation are likely to suffer irreparable harm. While the state unlawfully administers this program, Plaintiffs, the public, and federally recognized tribes are also denied other rights and remedies available under federal law, including the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., and the National Historic Preservation Act, 4 U.S.C. §§ 300101 et seq.

Request for Expedited Action

EPA claims to have effectuated the transfer of 404 authority to the state based on a December 22, 2020, notice approving the application effective immediately. (Exhibit 2.) EPA did not publish its approval of the state application as a rule, however, and did not codify the state program. Instead, EPA took the position that the action was an "adjudication," and that codification was optional. (Exhibit 3.) Adjudications, however, are case-specific, individual determinations that are judicial in nature and apply retroactively to parties in the dispute, not to the public at large. Safari Club Int'l v. Zinke, 878 F.3d 316, 332–33 (D.C. Cir. 2017). A rule, by contrast, includes agency actions of general or particular applicability designed to implement the law. 5 U.S.C. § 551(4). If an agency action "has the force of law," then it is a rulemaking. Gen. Motors Corp. v. E.P.A., 363 F.3d 442, 448 (D.C. Cir. 2004). Codification is required for all documents of an agency "having general applicability and legal effect."[3] 44 U.S.C. § 1510(a).

For the transfer to have legal effect, EPA would have to publish the approval of the state program as a rule and codify it. See 49 Fed. Reg 38,947-01 (Michigan program approval published as notice and regulation, codified); 59 Fed. Reg. 9,933-01 (New Jersey program approval published as final rule, codified); 85 Fed. Reg. 57,853, 57,855 (Sept. 16, 2020) (indicating Florida approval would be published and codified). EPA would also have to allow at least 30 days between publication of the rule and its effective date. 5 U.S.C. § 553(d).

Based on the foregoing, we respectfully request that EPA: (1) recognize that the transfer of authority has not been legally effectuated, and so notify the public and the state; (2) alternatively, publish the notice of approval and codification of the state program as a rule, and postpone the effective date of that rule pending judicial review, 5 U.S.C. § 705; and (3) initiate withdrawal of the approval in accordance with 33 U.S.C. § 1344(i), 40 CFR § 233.53(b)–(c).

[3] On January 15, 2021, EPA posted to its website a prepublication notice of a rule to codify the state program. (Exhibit 4.) The agency adhered to the position that its prior approval of the program was an adjudication rather than a rulemaking, and that the adjudication effectuated the transfer of authority and gave legal effect to the state program. (Id.) EPA described the anticipated codification of the program as "voluntary and ministerial" (id.) and stated that it did "not affect Florida's authority to administer the CWA 404 program" (id.). The codification rule was not published to the Federal Register website for public inspection by the close of business on January 19, 2021. It also would not cure the agency's failure to promulgate the program approval as a rule.

Factual Background

In a December 27, 2010, letter, EPA articulated its position that Section 7 consultation under the Endangered Species Act ("ESA") is not required when the agency transfers authority over Section 404 to a state. (Exhibit 5.) To support this position, EPA relied on National Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 673 (2007), which held that the consultation and no jeopardy requirements of Section 7 are not triggered by the transfer of Section 402 National Pollutant Discharge Elimination System ("NPDES") permitting authority to a state because the transfer is not discretionary, but mandated, once certain criteria are met. While EPA recognized some differences between Sections 402 and 404, EPA concluded that the same reasoning applied to transfers of authority under Section 404. (Exhibit 5.)

In 2019, Florida asked EPA to engage in ESA Section 7 consultation with U.S. Fish and Wildlife Services ("USFWS") and National Marine Fisheries Service ("NFMS") for purposes of its consideration of the state's request to assume jurisdiction over the 404 program. Florida made this request for the purpose of securing a programmatic biological opinion and incidental take statement to shield the state and its permittees from incidental take liability without having to follow the process set forth by Congress in Section 10 of the ESA.

On May 21, 2020, EPA invited "public comment on whether it "should reconsider its current position that consultation under Endangered Species Act (ESA) section 7 is not required when the EPA approves a state or tribe's request to assume the Clean Water Act (CWA) section 404 dredged and fill permit program under the CWA." 85 Fed. Reg. 30,953.

While that question was pending before EPA, on August 5, 2020, USFWS and Florida agencies developed a "Memorandum of Understanding" ("MOU") which provided:

> Upon assumption of the Section 404 Program, coordination between the USFWS and FDEP related to the proposed action's effects on species will occur through the technical assistance process, **which is anticipated to be outlined in the USFWS's biological opinion** based on information included in the biological assessment submitted by EPA.
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> **Incidental take for federally listed species** will be handled in accordance with the Biological Assessment and Biological Opinion developed for this assumption.

(Exhibit 6 (emphasis added).)

On August 20, 2020, Florida submitted its application to assume jurisdiction over the 404 program. The application included an MOU but did not include the technical assistance process that was anticipated to be outlined in a forthcoming biological opinion. On August 28, 2020, EPA deemed the application complete as of the date of submission, triggering a statutory 120-

day deadline to approve or deny the application unless EPA and the state agreed to extend the timeline. (Exhibit 7.) See 33 U.S.C. § 1344(h)(1); 40 C.F.R. § 233.15(a).

On August 27, 2020, Assistant Administrator David Ross issued a memorandum announcing that EPA had "reconsidered its prior position, articulated in 2010, that the decision to approve a state or tribal CWA Section 404 program does not trigger ESA Section 7 consultation." (Exhibit 8.) EPA explained that it had been persuaded by the state's advocacy for a one-time ESA Section 7 programmatic consultation in conjunction with EPA's initial review of an assumption application "as an efficient and legally-defensible approach to resolving the lack of incidental take coverage for permittees and permitting agencies" by providing a programmatic incidental take statement, preferable to the status quo of requiring permittees to "avoid adverse impacts to listed species or otherwise seek an incidental take permit under ESA Section 10." (Id.)

On September 2, 2020, EPA submitted an "ESA Biological Evaluation for Clean Water Act Section 404 Assumption by the State of Florida" to USFWS to initiate formal consultation on Florida's application.

On September 16, 2020, EPA issued a notice and request for comment on "Florida's Request to Assume Administration of a Clean Water Act Section 404 Program." 85 Fed. Reg. 57,853. The opportunity to comment closed on November 2, 2020. Id.

On October 21, and October 23, 2020, counsel for the Plaintiffs in this litigation urged EPA to reconsider its determination that the state's assumption application was complete as of submission for three reasons: (1) the failure to demonstrate how the state would ensure no jeopardy to listed species given its reliance on a "technical assistance" process to be outlined in a programmatic biological opinion that was anticipated, but not yet in existence; (2) the failure to adequately identify the waters over which the state would assume jurisdiction; and (3) the failure to demonstrate adequate staffing and resources to administer the program, which the state claimed would not require a penny in additional funding, even at a time when state coffers were under serious strain from the economic impacts of a pandemic, requiring budget cuts. (Exhibit 9.)

On November 2, 2020, Plaintiffs submitted extensive public comments identifying deficiencies in the state program on many key matters, such as permit review, permit conditions, general permits, emergency permits, compliance monitoring, and enforcement. In particular, we noted the state's failure to provide a criminal intent standard as stringent as that required by federal law for violations of the permitting program. (Exhibit 10.)

On November 17, 2020, more than two weeks after public comment closed, USFWS issued the programmatic biological opinion and incidental take statement outlining the technical assistance process on which the state relied. These documents were not made available for public comment. The programmatic biological opinion failed to analyze the status of the species, environmental baseline, effects of the action, or cumulative effects. 16 U.S.C. § 1536. The incidental take statement failed to specify the amount or extent of incidental take, impose a limit on incidental take, or specify a take-based trigger for reinitiating consultation, all in violation of

the ESA. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i)(1)–(4), 402.16(a). The incidental take statement extended protection from liability not only to EPA, but also to the state and state permittees so long as they complied with permit conditions created through the technical assistance process that would largely be left in the hands of the state, contrary to federal law.

On December 14, 2020, EPA requested comment on a proposed rule relating to "Criminal Negligence Standard for State Clean Water Act 402 and 404 Programs." 85 Fed. Reg. 80,713. EPA's proposed rule purported to continue to require state programs to have criminal intent standards as stringent as those provided by federal law, while adding that states could adopt "any" criminal negligence standard. Public comment closed on January 13, 2020.

On December 17, 2020, Administrator Andrew Wheeler announced approval of Florida's program at a press conference in Washington, D.C., and encouraged other states to follow Florida's example as a model.[4]

On December 22, 2020, EPA published notice of the approval, but failed to codify the program. 85 Fed. Reg. 83,553. See 44 U.S.C. § 1510(a) (requiring codification of rules). EPA purported to give the action immediate legal effect, but failed to articulate a lawful basis to do so. 5 U.S.C. § 553(d).

On December 22, 2020, Plaintiffs notified EPA that its failure to codify the program and afford the required 30-day period between publication and effective date meant that the state program did not have the force of law and that the authority to administer the Section 404 program in Florida remained with the U.S. Army Corps of Engineers. (Exhibit 2.)

On December 28, 2020, EPA responded with a letter to the state, asserting that its December 22, 2020, action was an adjudication, rather than a rule, and that the adjudication did not require a 30-day period between publication and effective date or codification. (Exhibit 3.) EPA asserted that this action authorized the state to administer its program.

On January 14, 2021, Plaintiffs filed the currently pending action challenging EPA's decision and related actions as unlawful. Ctr. for Biological Diversity, et al., v. Wheeler, No. 1:21-cv-119-RDM (D.D.C. January 14, 2021). (See Exhibit 1.)

APA Section 705 Request

Should EPA lawfully promulgate a rule authorizing the state program, Plaintiffs in the pending litigation respectfully request a postponement of the rule's effective date pending judicial review. To qualify for a Section 705 stay, Plaintiffs must establish that they are likely to succeed on the merits of their claims, that they will suffer irreparable harm absent preliminary relief, that the balance of equities weighs in their favor, and that a preliminary injunction would be in the public interest. In re Public Service Company of New Hampshire, 1977 WL 45581, at *6 (E.A.B. Aug. 12, 1977). Plaintiffs have met this standard.

[4] U.S. Envtl. Prot. Agency, EPA Approves Florida's Request to Administer the Clean Water Act Section 404 Program, YouTube (Dec. 17, 2020), https://youtu.be/QLUr-sMRRmo.

1. Likelihood of Success on the Merits.

Plaintiffs are likely to succeed on the merits of their claims that EPA's approval of the state program violates federal law. For purposes of this stay request, Plaintiffs focus on two, critical violations. First, EPA's approval was unlawful because the state's application failed to demonstrate the authority to ensure "no jeopardy" to listed species and relied on an anticipated programmatic biological opinion and incidental statement that, when finally issued, did not comply with federal law. In addition, the agency failed to provide the public with an opportunity to comment on those elements of the state's application, which were submitted to EPA after the public comment period had ended. Second, EPA's approval was unlawful because it allowed the state to eliminate an entire class of permit violations from criminal liability, thereby allowing the state to administer the program without demonstrating the enforcement authority required by federal law.

A. USFWS' Programmatic Biological Opinion and Incidental Take Statement, on Which EPA's Approval Relied, Are Unlawful.

EPA's approval of the state program relied on an unlawful programmatic biological opinion and incidental take statement that failed to include the amount or extent of take, monitoring measures, or reasonable terms and conditions. Additionally, the incidental take statement extends take liability coverage for the state and state permittees for the life of the program through an unlawful and unauthorized "technical assistance" process that gives the state the authority to make all meaningful decisions affecting listed species.

Congress enacted the ESA to, among other things, "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(2)(b). An "examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174 (1978).

The ESA prohibits any person, including private parties, states, and federal agencies, from "taking" an endangered species and authorizes suits to enforce the ESA and its implementing regulations. 16 U.S.C. §§ 1538(a)(1)(B), 1540(g)(1). Congress created two distinct paths to ensure that actions do not jeopardize the survival and recovery of protected species, and which can exempt parties' otherwise lawful actions from incidental take liability: (1) Section 7, Interagency Cooperation, which applies to federal agency actions, id. § 1536; and (2) Section 10, Exceptions, which applies to non-federal actions, id. § 1539. Congress enacted these mechanisms to provide protection from liability only so long as the specific measures developed by Congress to ensure protection of species were followed. USFWS' approach here does not comply with either.

When conducting a programmatic biological opinion, an incidental take statement is not required. 50 C.F.R. § 402.14(i)(6). However, if a federal action undergoing consultation includes an "incidental take statement" then it must specify the amount and extent of incidental take of the listed species that may occur without causing jeopardy or adverse modification,

include "terms and conditions," and provide for monitoring of take. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)–(3). The statement must specify the permissible level of taking (or "trigger") and specify the impacts such taking will have on affected species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i). This "trigger" denotes an unacceptable level of take that invalidates the safe harbor that extends take liability coverage and requires the federal agencies to immediately reinitiate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a). The "trigger" must be rational and cannot be an amount of take that causes jeopardy. Id. § 402.14(i)(4); Ctr. for Biological Diversity v. Salazar, 695 F.3d 893, 911 (9th Cir. 2012).

Section 7 prohibits federal agencies from taking actions that would cause jeopardy to protected species or adversely modify their critical habitat. 16 U.S.C. § 1536(a)(2). To achieve this substantive mandate, the federal action agency must engage in consultation with USFWS, the National Marine Fisheries Service, or both (the "consulting agencies") if their actions may affect listed species or their designated critical habitat. If the consulting agency determines that no jeopardy will result from the federal agency's action, but it will result in incidental take, then it may offer take liability coverage through an incidental take statement, so long as the federal agency and its permittees comply with the terms and conditions of the incidental take statement. Id. § 1536(a)(2), (o)(2).[5]

The Section 10 review process is much more stringent. It often requires applicants to conduct biological studies and gather appropriate data (including species population surveys, species distribution information, and/or habitat modeling and distribution) to obtain the "thorough, up-to-date biological information" required. (Exhibit 11.) To obtain incidental take coverage, an applicant must create a "robust analysis" of its activities' impact on listed species, which is more than a mere "tally of how many individuals (or surrogate, e.g., acres of habitat) will be taken." (Id.) The Section 10 process also requires USFWS to comply with other federal laws, including the National Environmental Policy Act and National Historic Preservation Act. (Id.) And it requires USFWS to comply with the ESA, conducting intra-agency consultation to ensure its approval of an HCP and incidental take permit does not jeopardize listed species. (Id.)

On August 27, 2020, EPA reversed its longstanding position that consideration of a state assumption application did not trigger the Section 7 requirements of the ESA and adopted Florida's preferred approach of a one-time consultation at the time of initial review. As EPA acknowledged, Florida sought this reversal so that the state and *its* permittees could circumvent Section 10 of the ESA and still obtain protection from liability for incidental take. On November 17, 2020, USFWS delivered what the state sought: USFWS used its Section 7 consultation with EPA to issue a programmatic biological opinion and incidental take statement purporting to insulate the state and state permittees from take liability, so long as state permit conditions were met. However, the consultation established no guidelines or requirements on what those permit

[5] See also 50 C.F.R. § 402.01 (Section 7 directs federal agencies to consult to further the purposes of the ESA); id. § 402.11(b) (applicant for federal permit may ask federal agency to engage in consultation); id. § 402.14(a) (federal agency Section 7 duty to determine whether its actions may affect listed species or critical habitat); id. § 402.15 (federal agency duties following issuance of biological opinion).

conditions must contain. Neither did the statement specify the impacts of incidental take. USFWS' actions were unlawful, rending EPA's approval unlawful on this basis as well.

USFWS' programmatic biological opinion failed to meet the requirements of the ESA. To start, USFWS wholly failed to assess the risk of jeopardy to species at the programmatic level, the very task for which consultation was required. (Exhibit 12.) 50 C.F.R. § 402.14(c)(4) (programmatic biological opinion does not relieve the agency "of the requirements for considering the effects of the action or actions as a whole."). USFWS sidestepped any meaningful assessment and instead took the circular position that EPA's approval of the state program would result in no jeopardy at a programmatic level because state permits would presumably be required to result in no jeopardy at the permit level. (Id.)

The incidental take statement acknowledged that USFWS did not know which species would be taken, the locations of take, or how many members of listed species would be harmed, killed, or otherwise taken as a result of state permits authorizing the discharge of dredged and fill material in waters of the United States. (Id.) While federal regulations required the agency to specify the impacts of the action, 50 C.F.R. § 402.14(I)(1)(I), here USFWS instead relied on EPA's biological evaluation for a generic discussion of impacts to species. (Id.) USFWS then expressly added that, "[w]hile the BE provided a detailed analysis of typical impacts related to stressors to ESA-listed species, inability to anticipate the locations of future State 404 permit applications did not allow the Service to conduct site- and species-specific analyses to estimate the number of individuals that might be affected by the permitted activities." (Id.) The incidental take statement failed to include any method for recording or monitoring incidental take or to consider the cumulative impact of individual permit decisions. (Id.) It also failed to require EPA to implement take minimization measures. (Id.)

An incidental take statement serves as a check on a biological opinion's assumptions and conclusions regarding the extent and amount of authorized take. 50 C.F.R. § 402.14(i)(1). See also Salazar, 695 F.3d at 910–11 (explaining purpose of ITS is to "serve[] as a check on the agency's original decision that the incidental take of listed species resulting from the proposed action will not [jeopardize the continued existence of the species]" (second alteration in original) (citation omitted)).

The incidental take statement here failed to identify the amount and extent of incidental take of listed species that was expected to occur and that would be authorized under the terms of the ITS. (Id.) While USFWS may use surrogates to establish take limits in certain circumstances, the incidental take statement here made no such attempt. (Id.) Having failed to set a take limit, the incidental take statement then failed to set a trigger for reinitiating consultation based on exceeding that limit. (Id.)

USFWS then went a step further. It extended take liability coverage not only to the consulting federal agency (EPA), but also to the state and its permittees through an unlawful process where the state—and not USFWS or any other federal agency—is driving ESA

decisions. Under the "technical assistance"[6] process set forth by the programmatic biological opinion, it is the state that has the primary role in deciding whether a permit action will jeopardize the survival and recovery of protected species or adversely modify their critical habitat; deciding what effects a permit action will have on listed species; and defining what protective measures, if any, would be required to mitigate those harms. (Exhibit 12.) EPA and USFWS are obligated to provide very little, if any, oversight on the state's actions. (Id.)[7] There is no Congressional authority to use Section 7 consultation in this way.

Section 7 requires federal agencies to determine the effects of their actions, to consult with USFWS if their actions may adversely affect protected species, and to obtain take liability coverage through an incidental take statement, so long as the federal agency and its permittees comply with the terms and conditions of the incidental take statement. 16 U.S.C. § 1536(a)(2), (o)(2).[8] At a programmatic level, Section 7 allows agencies to "tier" site-specific biological opinions to a programmatic biological opinion. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1063 (9th Cir.), amended, 387 F.3d 968 (9th Cir. 2004) (permitting tiering to programmatic biological opinion); Native Ecosystems Council v. Krueger, 63 F. Supp. 3d 1246, 1250 (D. Mont. 2014), aff'd sub nom. Native Ecosystems Council v. Marten, 883 F.3d 783 (9th Cir. 2018) (requiring federal agency to obtain site-specific biological opinion); Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 726 F. Supp. 2d 1195, 1231–32 (D. Mont. 2010) (systemic deferral of site-specific biological opinions unlawful).

Section 7 does not, however, authorize USFWS to allow a state to step in the shoes of a federal agency to conduct site-specific analyses, determine effects on species, set incidental take limits, and establish protection measures. See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 900 F. Supp. 2d 1151, 1154–55 (D. Nev. 2012), aff'd, 807 F.3d 1031 (9th Cir. 2015) (tiered ESA process included Section 7 programmatic biological opinion site-specific

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[6] Although the ESA Section 7 Consultation Handbook—a USFWS guidance document cited in the biological opinion—includes technical assistance as a preliminary step available for federal action agencies, it is entirely directed at early discussions with *federal* action agencies about the presence or absence of species, recommendations for additional studies the federal action agency should conduct, notification of candidate species, and assisting federal action agencies outside the United States. (Exhibit 13). It does not discuss or authorize a Section 7 technical assistance process for a state action agency.

[7] See, e.g., (Exhibit 15 at 19 (Programmatic Biological Opinion) ("In some cases, depending upon the project, USFWS may submit recommendations to FDEP/FWC. In other cases, the species coordination lead will compile a package of proposed measures and transmit it to USFWS for their review and comment."); id. at 18 ("USFWS will review and may suggest modifications or recommend additional protective measures, as needed."); id. at 26 (USFWS may or may not comment on preliminary protection measures); id. at 27 (USFWS will provide recommendations as needed…").)

[8] See also 50 C.F.R. § 402.01 (Section 7 directs federal agencies to consult to further the purposes of the ESA); id. § 402.11(b) (applicant for federal permit may ask federal agency to engage in consultation); id. § 402.14(a) (federal agency Section 7 duty to determine whether its actions may affect listed species or critical habitat); id. § 402.15 (federal agency duties following issuance of biological opinion).

Section 10 incidental take permits for non-federal entities). There is no indication that Congress intended for Section 7 to give states such authority, much less so as an intentional workaround to Section 10 of the ESA, which Congress enacted to address exemptions from take liability for state actions. 16 U.S.C. § 1539(a)(1)(B). (Accord Exhibit 11 (USFWS, HCP Handbook at 3-5 (Section 10 applies to "any State").)

Instead of complying with the law, USFWS crafted an unlawful, unauthorized shortcut to the ESA's federal regulatory regime because the agency and the state in close coordination determined the shortcut was worth the payout: obtaining take coverage for all state 404 permits without the robust analysis required by federal law to ensure species protection at the permit-level. USFWS' action was therefore arbitrary, capricious, not in accordance with the law, and in excess of statutory authority, as was EPA's reliance on it to approve the state program. 5 U.S.C. § 706.

B. EPA Denied Notice and Comment Opportunity on Technical Assistance Process, a Key Element of the State's Application.

EPA's determination that the state met the Clean Water Act's "no jeopardy" requirement relied on three elements of the state's August 20, 2020, application: (1) an unexecuted MOU between USFWS and state agencies; (2) state regulations that would take effect once assumption was approved; and (3) the state's program description. (See Exhibit 14 (EPA Response to Comments on State of Florida's Program Submission Requesting to Assume Administration of a Clean Water Act Section 404 Program 19 (Dec. 16, 2020) [hereinafter "Response"]).) All three relied on a "technical assistance" process developed by the programmatic biological opinion, which did not exist at the time EPA made its "completeness determination" and was not completed until *after* the public's opportunity for notice and comment ended.

To lawfully approve Florida's program, EPA was required to determine that the state had demonstrated the authority to issue permits which "apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section." 33 U.S.C. § 1344(h)(1)(A)(i). The 404(b)(1) Guidelines, in turn, required the state to demonstrate that state-issued permits would result in no jeopardy to listed species. 40 C.F.R. §§ 230.10(b)(3), 233.11(a)–(c).

The MOU provided that USFWS would give "technical assistance" to state agencies for purposes of ensuring no jeopardy to listed species. What this process would entail, however, was not defined. Instead, the MOU stated that "the technical assistance" process was "anticipated to be outlined in the USFWS' biological opinion based on information included in the biological assessment submitted by EPA." (Exhibit 6.) The MOU further provided that "[i]ncidental take for federally listed species will be handled in accordance with the Biological Assessment and Biological Opinion developed for this assumption." (Id.) The MOU acknowledged that the state would rely on the expertise of USFWS, while imposing no duty on the Service to lend that expertise. (Id.) Neither USFWS' programmatic biological opinion nor EPA's biological assessment (later titled biological evaluation) was submitted with the state's application. Indeed, neither existed at the time.

The state-promulgated regulations, too, provided that compliance would be accomplished through, and determined by, the forthcoming "consultation … or technical assistance" process between the state and USFWS. See Fla. Admin. Code § 62-331.051 (applicants for individual permits will be required to provide "data and information for purposes of reviewing impacts to state and federal listed species, including compliance with any applicable requirements resulting from consultation with, or technical assistance by," the state agencies and USFWS); id. § 62-331.053(3)(a) (no permit shall be issued that causes jeopardy to listed species or results in adverse modification of critical habitat as determined by compliance with "any requirements resulting from consultation with, or technical assistance by" the state agencies and USFWS); id. § 62-331.010(5) (404 Handbook §§ 1.3.33 (requiring compliance with requirements resulting from the "technical assistance" process); id. § 5.2.3 (referring to the "technical assistance" process)). By relying on processes that had not yet been articulated or produced, these regulations too did not provide an adequate basis for EPA to find the state had met the "no jeopardy" requirement.

Finally, the program description incorporated the MOU and provided a two-page summary of the process the state intended to follow. (Exhibit 15 (Program Description, App. a-1 at 21-23).) While the program description discussed what it contended were binding obligations on USFWS to assist the state and provide recommendations on a project-by-project basis, nothing in the MOU, state-promulgated regulations, or any other document submitted with the state application imposed any such duties on USFWS. (See id. (federal agency "will" assist in effect determination, USFWS "will" review applications and provide recommendations).) The state's program description had no legal effect and certainly, it could neither authorize nor require a federal agency to act.

The public had a right to comment on a complete program application. 5 U.S.C. § 553; 40 C.F.R. § 233.15(e)(1). Public notice and comment rights are (1) intended to improve the quality of agency rulemaking by ensuring that regulations are tested by exposure to diverse public comment; (2) an essential component of fairness to affected parties; and (3) an opportunity for parties to develop evidence in the record to support their objections to a rule, which in turn enhances the quality of judicial review. Small Refiner Lead Phase-Down Task Force v. U.S. Env't Prot. Agency, 705 F.2d 506, 547 (D.C. Cir. 1983) (internal citations and quotation marks omitted). The core of the state's demonstration that it had authority to operate a 404 program that would not jeopardize protected species was the "technical assistance" process in the programmatic biological opinion. Without access to the programmatic biological opinion, the public was denied this opportunity, left in the dark and unable to comment on the "technical assistance" scheme that EPA relied upon to approve the program.

In response to comments objecting to the denial of an opportunity to comment on the technical assistance process laid out in the biological opinion, EPA relied on Cooling Water Intake Structure Coalition v. U.S. Environmental Protection Agency, to argue that because "there is no independent right to public comment with regard to consultations conducted under § 7(a)(2) of the ESA" there was no violation here. 898 F.3d 173 (2d Cir. 2018), amended, 905 F.3d 49, 78 (2d Cir. 2018). (Exhibit 14.) EPA's position misses the boat. The question is not whether there is an abstract right to comment on a biological opinion. The question is whether the public was afforded a right to comment on Florida's complete application, when that application relied on a

component that did not exist, and was not made available, during the public comment period. While there may not be an independent basis for notice and comment on biological opinions under the ESA, there is a right to comment on a state's assumption application. EPA denied the Plaintiffs that right.

Permitting the public only to comment on an incomplete application undermined the agency's rulemaking by precluding meaningful testing, denied fairness to affected parties, and precluded the opportunity to develop evidence in the record for judicial review. 5 U.S.C. § 553; Small Refiner Lead Phase-Down Task Force, 705 F.2d at 547.

C. EPA's Approval Violated the Clean Water Act Because the State Program Failed to Meet Minimum Federal Standards Regarding Enforcement.

Before the EPA could lawfully approve the state 404 program, the agency was also required to determine that the state would have authority "[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1344(h)(1)(G). Specifically, EPA regulations required that "the burden of proof and degree of knowledge or intent required under State law for establishing violations under … this section shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act." 40 C.F.R. § 233.41(b)(2). See also id. § 233.1(d) (state 404 program must "be conducted in accordance" with Clean Water Act and implementing regulations, and "may not impose any less stringent requirements for any purpose").

Plaintiffs are likely to succeed on their claim that EPA unlawfully approved the state program because the state requires a degree of knowledge or intent that is "greater than" that required under the Clean Water Act. See Idaho Conservation League v. U.S. Envtl. Prot. Agency, 820 F. App'x 627 (9th Cir. 2020) (EPA abused its discretion in approving a state delegated program with a mens rea standard greater than intent standard required of the EPA). By requiring a higher degree of intent to establish Section 404 violations, the state does not recognize an entire class of criminal violations that exist under federal law. The inability to abate an entire class of violations of permits and of the permitting program undermines the deterrent effect of the Clean Water Act's strict provisions, and thereby reduces protections for wetlands and the ecosystems, protected species, and communities that rely on them. EPA's approval of the state's program notwithstanding the patent failures to meet this minimum federal standard was arbitrary and capricious and not in accordance with the law.

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and attain "water quality which provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation" in response to decades of failures by states to protect and clean waters of the United States. 33 U.S.C. § 1251(a).[9] Before that time, federal laws protecting the Nation's waters were limited to

[9] Montgomery Envtl. Coal. v. Costle, 646 F.2d 568, 574 (D.C. Cir. 1980); H.R. 11,896, 92nd Cong. (1971) & S. 2770, 92nd Cong. (1971) (Clean Water Act bills were written to expand federal authority and control to control and eliminate water pollution across the country).

providing assistance to states in an attempt to incentivize them to do the right thing—an approach that had failed. US. Envtl. Prot. Agency v. California, 426 U.S. 200, 202-09 (1976); Am. Paper Inst., Inc. v. U.S. Envtl. Pro. Agency, 890 F.2d 869, 870-71 (7th Cir. 1989). Congress made plain that the Clean Water Act set minimum federal standards for all states to follow. States retained only the flexibility to be more, but never less, protective than the Clean Water Act's foundational protections. See 33 U.S.C. § 1311(b)(1)(C); PUD No. 1, of Jefferson Cty. v. Wash. Dep't of Ecology, 511 U.S. 700, 705–07 (1994).

Section 404 is an essential component of the Clean Water Act, in that it regulates the discharge of dredged and fill material into waters of the United States, including wetlands. The Clean Water Act recognizes that the degradation and destruction of wetlands is "among the most severe environmental impacts." See 33 U.S.C. § 1251; 40 C.F.R. § 230.1(a). Many developments and similar projects in Florida require 404 permits because of the state's extensive wetlands in waters of the United States. Particular care is required because Florida's wetlands are also vital to hundreds of threatened and endangered species, filter drinking water into the aquifer, provide resiliency from hurricanes, and support the state's economy.

The Clean Water Act prohibits the discharge of dredged or fill material where there is a less environmentally damaging alternative that is practicable. 40 C.F.R. § 230.10(a). It further prohibits any discharge that would contribute to violation of water quality standards; violate any applicable toxic effluent standard or prohibition; jeopardize the continued existence of ESA-listed species; result in likely destruction or adverse modification of critical habitat; or violate any requirement by the Secretary of Commerce to protect a marine sanctuary. Id. § 230.10(b). The Clean Water Act prohibits the permitting of any discharge "which will cause or contribute to significant degradation of the waters of the United States" as determined based on factual findings, evaluations, and tests required under the Section 404(b)(1) Guidelines, "with special emphasis on the persistence and permanence of the effects outlined in" the Guidelines. Id. § 230.10(c). Lastly, the Clean Water Act prohibits discharge of dredged or fill material "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." Id. § 230.10(d).

To ensure compliance with these provisions, when a person violates 33 U.S.C. § 1344 by discharging dredged and fill material in the waters of the United States without a 404 permit, or without complying with the terms of a 404 permit, the Clean Water Act authorizes civil and criminal enforcement. Id. § 1319. Enforcement serves as a critical safeguard and deterrent to violations of the Clean Water Act. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185; United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1978) ("The [Clean Water] Act would be severely weakened if only intentional acts were proscribed. We will not interpret it that narrowly, particularly when the legislative history is clear Congress intended strong regulatory enforcement.").

Congress spoke directly and unambiguously to the mens rea requirement for Clean Water Act violations when stating that "[a]ny person who … negligently violates" a permit issued by the Corps or a state under Section 404 "shall be punished." U.S.C. § 1319(c)(1). The standard is simple negligence. See United States v. Maury, 695 F.3d 227, 259 (3d Cir. 2012) (interpreting the plain language of "negligence" to mean ordinary negligence); United States v. Pruett, 681

F.3d 232, 243 (5th Cir. 2012) (same); United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005) (same); United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999) (same). The simple negligence standard expressly applies to 404 permits violations whether those permits are issued by the Corps or a state. 33 U.S.C. § 1319(c)(1)(A).

The intent standard employed by Florida, on the other hand, is gross or culpable (criminal) negligence. See Fla. Stat. §§ 373.430(1)(a), 373.430(3)–(4) (requiring willfulness, reckless indifference, or gross careless disregard to establish criminal liability for a pollution offense); id. §§ 373.430(1)(b)–(c), 373.430(5) (requiring willfulness to establish criminal liability for permit violations and false statements). In Florida, culpable negligence is defined as "reckless indifference or grossly careless disregard of the safety of others." State v. Greene, 348 So. 2d 3, 4 (Fla. 1977). It has also been defined as "a gross and flagrant character, evincing reckless disregard for human life or of the safety of persons exposed to its dangerous effects;" or "the entire want of care which would raise the presumption of indifference to consequences;" or "reckless indifference to the rights of others, which is equivalent to an intentional violation of them." Id. Unlike simple negligence, culpable negligence encompasses threatened or actual harm to others and can be the basis for violent crimes such as manslaughter. Such a high bar would exclude an entire class of permit violations that are subject to criminal penalty under federal law. This is not what Congress intended.

Authorizing the state to require a higher mens rea standard undermines the deterrent effect of the enforcement program Congress enacted in the Clean Water Act. It also shields those who commit criminal violations of Section 404 in Florida from accountability.

EPA was aware of this defect in the state's application early on, and the matter was also brought to the agency's attention during the public comment period. EPA approved the application anyway. In its response to comments, EPA relied on two, unavailing arguments: First, it claimed that Section 404(h) of the Clean Water Act does not "use the words 'all applicable,' 'same,' or any phrase specific to any mens rea standard, let alone the Federal standard, as it did in other parts of [Clean Water Act] Sections 404(h)." (Exhibit 14 (Response at 75).) Second, EPA argued that the "general language used to address required state and tribe authorities to abate violations, and the absence of any citation to CWA Section 309, indicates that Congress allowed for variability between state or tribal approaches to certain aspects of enforcement." (Id. (Response at 75).)

In addition to violating the plain language of the statute, EPA's position is entirely inconsistent with its own regulation on the topic, 40 C.F.R. § 233.41(b)(2), which requires that the mens rea for state programs be "no greater" than that under federal law.[10] It also allows a state program to be less stringent than federal law, in violation of 40 C.F.R. § 233.1(d). Moreover, although Section 404(h) may not refer explicitly to Section 319(c) in describing the

[10] Indeed, since 1984, the EPA has required that mens rea standards in state programs under the section 402 and 404 programs be at least as stringent as the standards EPA must meet. See 40 C.F.R. § 123.27(b); id. § 233.41(b)(2) ("[t]he degree of knowledge or intent required under State law for establishing violations under … this section shall be no greater than the … degree of knowledge or intent EPA must bear when it brings an action under the Act").

requirements for a state-approved program, that does not mean the opposite is true. Section 319(c) in fact explicitly establishes criminal penalties for *negligent* violations of any 404 permit issued by the Corps *or a state*. 33 U.S.C. § 1319(c)(1)(A). See, e.g., United States v. Maury, 695 F. 3d at 246, 256–58 (affirming court's jury instruction on simple negligence, rather than gross negligence, in enforcement action under New Jersey-issued NPDES permit issued pursuant to assumed section 402 program; court cited plain language of statute noting when Congress intends a higher mens rea requirement in other provisions of the Act it explicitly state so). Since 404 permits may only be issued by a state pursuant to an EPA-approved state assumed program, the plain statutory language requires that state 404 programs have a baseline negligence standard for criminal liability.

EPA's statement that it "interprets the Agency's implementing regulations for CWA Section 404 to allow for approved state and tribal programs to have different approaches to criminal enforcement" cannot be squared with the plain language of the agency's own regulation requiring that the mens rea for state 404 enforcement programs be "no greater" than that under federal law. 40 C.F.R. § 233.41(b)(2). As discussed above, the only flexibility afforded by the Clean Water Act is a one-way ratchet, allowing states to be *more*, not less, protective.

EPA argues that this novel interpretation of its own regulation is consistent with the Court of Appeals for the D.C. Circuit's decision in Natural Res. Defense Council, Inc. v. U.S. Envtl. Prot. Agency (NRDC), 859 F.2d 156, 181 (D.C. Cir. 1988). NRDC, however, was not a case about the criminal intent necessary to establish a violation. It was a case about the *penalties* that a state program might impose *after* finding a violation. Id. at 180.

Here, EPA approved a program with less stringent enforcement capacity than the federal floor. This authorizes a state program that is *harder* to enforce because of a higher mens rea standard than under federal law. EPA's interpretation creates the very scenario the agency sought to avoid in NRDC: allowing state-assumed programs with higher mens rea standards would be less effective and require EPA to step in to ensure compliance with the Clean Water Act.

The same is true of Akiak Native Community. v. U.S. Environmental Protection Agency, 625 F.3d 1162 (9th Cir. 2010), on which EPA also relied. Id. at 1171–72 (declining to find inadequate enforcement authority where a state lacked authority to impose administrative penalties available to the EPA). Like NRDC, Akiak did not involve criminal liability for Clean Water Act violations. It involved a challenge to Alaska's inability to assess civil penalties administratively compared to the federal Section 402 program. Akiak, 625 F. 3d at 1171. EPA regulations allow EPA flexibility when it comes to a state program's civil penalties, 40 C.F.R. § 233.41(d)(1), but that flexibility does not extend to the criminal intent standard.

Here, by contrast, EPA's action allows Florida, and would allow other states, to exclude an entire class of permit violations from criminal liability. At issue is not *how* a state might abate criminal violations, or what enforcement action a state might take *against* such a violation, but the very definition of what constitutes a criminal violation in the first place. There is nothing in the CWA that authorizes a state program to decline to recognize an entire class of criminal violations at all. To permit this would be to allow a state 404 program to legalize activity that is

patently unlawful under the Clean Water Act. This conflicts with the plain language of 33 U.S.C. § 1319(c) (establishing negligent actions as criminal violations of the 404 program) and the requirement that state programs demonstrate the authority to "abate violations" under the Act.

EPA's approval of such a program also undermines the deterrent effect that Congress sought by prohibiting negligent violations of Section 404 and the incentives to ensure full compliance with the permitting program. Ordinary negligence is the lowest form of criminal mens rea aside from strict liability. It is the failure to use care that a reasonably prudent and careful person would under similar circumstances. United States v. Hanousek, 176 F.3d at 1120. This mens rea standard allows robust criminal enforcement of permit violations—and therefore greater environmental protections—because it sets a lower bar the government must meet to bring and prevail in an enforcement action and promotes compliance through deterrence.

Nor can the EPA's action be saved by a new rule the agency proposed on December 14, 2020. (Exhibit 14 (Response at 76).) First, the EPA's proposed rule was not the law when EPA approved Florida's program on December 17, 2020. The public comment period, alone, did not conclude until January 13, 2021. Second, the EPA concedes that the proposed rule "is based on the interpretation of the CWA outlined" in its response to comments on Florida's application, demonstrating that it rendered a decision on Florida's application based on an agency interpretation and regulatory change not lawfully adopted by the agency. Third, the rule is unreasonable on its face and if adopted will not withstand challenge. It proposes to maintain the requirement that a state's criminal intent standard be as stringent as EPA's, but then purports to create an exception that allows states to adopt any negligence standard of their choosing. 85 Fed. Reg. 80,713, 80,717–18. Both things cannot be true. Fourth, the rule conflicts with the plain meaning of Section 1319. 33 U.S.C. § 1319.

EPA's new interpretation would also allow states to implement inconsistent and contrary levels of water resource protections through differing levels of mens rea. This contradicts the basic policy and purpose of Congress to provide a minimum baseline of water protections across the nation. Indeed, the Supreme Court has directed that one state's permitting cannot interfere with another state's implementation and achievement of its water Clean Water Act standards and protections. See Arkansas v. Oklahoma, 503 U.S. 91 (1992). Like in Arkansas, a different mens rea in an upstream or bordering state could negatively affect a downstream state's ability to obtain equal and adequate enforcement of standards and permit requirements.

Plaintiffs are therefore likely to succeed on their claim that EPA's approval of the state program was unlawful, as it did not meet the minimum standards of the Clean Water Act and is not as stringent as federal law.

2. Absent preliminary relief, Plaintiffs are likely to suffer irreparable harm before the conclusion of this litigation.

For harm to be irreparable, the harm must be "certain, great, actual, and imminent." Seeger v. U.S. Dep't of Defense, 306 F. Supp. 3d 265, 291 (D.D.C. 2018). Parties need not show absolutely certainty that the threatened harm will occur but must show certainty in

increased risk that the threatened harm will happen. See Conservation Law Found. v. Ross, 422 F. Supp. 3d 12, 33 (D.D.C. 2019) (finding irreparable harm to plaintiffs' ability to observe whales if certain ocean areas were opened to gillnet fishing, where such opening "is likely" to shift fishing to the locations at issue and "thus increase the risk of … whales becoming entangled in the gear"). Furthermore, parties can establish irreparable harm "even though the precise scope of that harm may not be fully known" because of the government's failure to conduct an environmental evaluation. Brady Campaign to Prevent Gun Violence v. Salazar, 612 F.Supp.2d 1, 25 (D.D.C. 2009).

Plaintiffs in the pending litigation are at risk of irreparable harm by the state's unlawful operation of the state 404 program. The state is currently considering permits that are reasonably expected to fill precious wetlands that serve as habitat for threatened and endangered species, and their issuance is imminent. Because the programmatic biological opinion and incidental take statement are fatally flawed, permits issued pursuant to these are likely not to receive necessary protections to which they are entitled under federal law. The EPA's failure to properly analyze whether its approval of the state's assumption will cause jeopardy to listed species at a programmatic level and whether the state 404 program will ensure no jeopardy at the permit level, leaves species without the proper protections to ensure their survival and recovery. USFWS's improper incidental take statement, relied on by EPA, exacerbates these harms by providing a blank check for the take of listed species. Moreover, because of the state's weakened enforcement regime, there is less deterrence for permit violations, which in turn increases the risk of harm.

For example, the state is currently considering a 404 permit application for Troyer Mine, which would destroy 214 acres of wetlands that are part of a conservation area to protect Lee County's shallow aquifers, and are within the consultation areas for many endangered and threatened species, including the Florida panther, Florida bonneted bat, red cockaded woodpecker, Audubon's crested caracara, the Florida grasshopper sparrow, the Everglade snail kite, and the Florida scrub jay. (Exhibit 16.) In fact, 90% of the project site is in Primary Zone habitat for the critically endangered Florida panther, meaning it is habitat essential for the continued survival and recovery of the species. (Id.) Panthers are one of the most endangered species on the planet, with only 120 to 230 adults remaining in the wild. (Id.) Habitat loss is one of the primary risks for panther survival, as are vehicular collisions. (Id.) The Troyer Mine project would result in an estimated 2,089 daily truck trips to and from the site. (Id.)

Plaintiffs have reason to believe that issuance of this permit is imminent, because there is no open public comment period, and the state already issued a state-level Environmental Resources Permit ("ERP") authorizing the project. In its 404 application, the state averred that existing state requirements overlap by roughly 85% with federal requirements. (Exhibit 17 (State Application (B), subpart (d) at 2).) While Plaintiffs strongly disagree, from the state's point of view, the issuance of the ERP permit demonstrates that the project meets about 85% of the criteria for a 404 permit. The state has also consistently indicated that its goal in assuming jurisdiction over the 404 program is to issue permits faster, and to as great an extent as possible, in alignment with the rapid processing schedule for state permits. 44 Fla. Admin. Reg. 2321 (May 11, 2018).

The loss of these wetlands and the impacts to panthers and their habitat would irreparably harm Amber Crooks, a member and employee of Plaintiff Conservancy of Southwest Florida. Ms. Crooks regularly hikes, camps, and tries to observe wildlife, including panthers, less than three miles away in Corkscrew Regional Ecosystem Watershed, which also is located within panther habitat. (Exhibit 16.) This is only one of the many projects that if granted would cause irreparable harm to Ms. Crooks' use and enjoyment of Florida's natural environment because of their impacts on wetlands, water quality, and species and their habitat. (Id.)

Dr. Rachel Silverstein, a member and employee of Miami Waterkeeper, will suffer irreparable harm from the state's anticipated issuance of the Port 1850 LLC project. The Port 1850 project would fill 4.21 acres of mangrove wetlands in Fort Lauderdale, Florida. (Exhibit 18.) The 404 permit application for this project has been transferred to the state. (Id.) As with Troyer Mine, the state has already granted the project's ERP permit. There is no open public comment period. It is therefore reasonable to believe that issuance of the 404 permit is imminent.

Mangroves wetlands like those set to be destroyed by the Port 1850 project provide critical habitat for endangered species. (Id.) Destruction of these mangroves wetlands will also harm threatened Johnson's seagrass, which has been found directly abutting the project area. (Id.) Destruction of mangroves releases large amounts of sediment and nutrients, which can be fatal to seagrasses by causing shading, suffocation, or eutrophication, which can lead to algae blooms. (Id.) Many protected species rely on seagrass for their survival, including the manatee, American crocodile, loggerhead sea turtle, hawksbill sea turtle, leatherback sea turtle, Kemp's ridley sea turtle, roseate tern, wood stork, and bald eagle. (Id.) Harm to sea turtles is of particular concern because this part of South Florida is home to one of the world's largest loggerhead rookeries and increasing green and leatherback turtle breeding populations. (Id.)

The harms that will likely result from the Port 1850 LLC project will negatively impact Dr. Silverstein's ability to enjoy boating and diving at the mouth of Port Everglades, which is only two miles from the project, where she enjoys observing listed corals and marine wildlife. (Id.)

The state's likely issuance of these permits pursuant to an unlawful 404 program, operating pursuant to an unlawful ESA biological opinion and incidental take statement, is likely to irreparably harm these species and their habitat. Even the loss of a few individual members of an endangered species can constitute irreparable harm. Am. Rivers v. U.S. Army Corp of Eng'rs, 271 F. Supp. 2d 230, 259 (D.D.C. 2003). The Supreme Court has recognized that environmental damage, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987); see also Brady Campaign to Prevent Gun Violence, 612 F. Supp. 2d at 25 ("[E]nvironmental and aesthetic injuries are irreparable."). The permanent loss of these wetlands will have a substantially adverse effect on scenery, wildlife, recreation, and other environmental values. Nat'l Wildlife Fed'n v. Burford, 835 F.2d 305, 324 (D.C. Cir. 1987).

The ESA "has been regarded as the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Oceana, Inc. v. Pritzker, 75 F. Supp. 3d,

469, 474 (D.D.C. 2014) (internal quotations omitted). One critical component of that protection is ensuring that actions federal agencies undertake, including in issuing 404 permits and approval of a state's assumption of the 404 program, "do not jeopardize endangered wildlife and flora." Id. Here, the EPA and USFWS have not performed this necessary analysis at the programmatic-level. Instead, they have punted the analysis to the state to determine impacts, take limits, and protection measures in a piecemeal fashion at the permit-level through a process not authorized by Congress. The process does not require the critical analyses contemplated by Section 10 to ensure the full protections afforded to imperiled species under federal law when actions are carried out by state actors and private citizens. Yet permittees will enjoy protection from incidental take as long as they comply with their 404 permit conditions. This broad take coverage, combined with reduced liability for permit violations under the state enforcement scheme, will reduce incentives to strictly comply with federal law.

For purposes of assessing irreparable harm, it is also appropriate to consider the obstacles organizations will face to accomplish their primary mission if preliminary relief is not granted. League of Women Voters, 838 F. 3d at 8 (finding irreparable injury to the League from obstacles to their voter registration efforts due to upcoming election); Brady Campaign to Prevent Gun Violence, 612 F.Supp.2d at 24 (granting preliminary injunction finding procedural violation, while not sufficient alone to establish irreparable injury, is "certainly a relevant consideration" and courts have not hesitated to find likelihood of irreparable injury when it is combined with an alleged environmental or aesthetic injury); Fund for Animals v. Norton, 281 F. Supp. 2d 209, 219-222 (D.D.C. 2003) (finding procedural harm from NEPA violation bolstered plaintiffs' case for a preliminary injunction when combined with alleged irreparable aesthetic injuries and granted injunction).

To show irreparable organizational harm for preliminary relief, there is a two-part test: 1) an organization is harmed if the "actions taken by [the defendant] have perceptibly impaired the [organization's] programs," and 2) if so, the organization must then also show that the defendant's actions "directly conflict with the organization's mission." *Id.* (brackets in original) (internal quotes omitted).

Plaintiffs and their members will be irreparably harmed because EPA's approval not only authorizes a state program that does not meet federal requirements, it also deprives those who are adversely affected by 404 permits of rights and remedies available under federal law. Primary among these is the inability to access the state courts to challenge permits in a manner comparable to the ability to access federal courts.

Under federal law, associational standing may be established on the basis of a single member's harms resulting from the challenged conduct. See Sierra Club v. Johnson, 436 F.3d 1269, 1279 (11th Cir. 2006) (associational standing of Sierra Club satisfied by affidavit of one member who suffered injury in fact). In Florida that is not the case. To establish standing in Florida, an organization is required, among other things, to demonstrate that a "substantial

number" of its members would be harmed by the challenged action.[11] Plaintiffs in the pending litigation have hundreds and thousands of members. Demonstrating that a substantial number of those members would be affected by a particular permit would be difficult, if not impossible. Even state-based organizations, such as Plaintiff Florida Wildlife Federation, have been denied access to sue based on this onerous standing requirement. See Fla. Wildlife Fed'n v. Fla. Dep't of Envtl. Prot., Case No. 14-1644RP, 2014 WL 4627151 at *5, 14 (Fla. Div. of Admin. Hearings Sept. 11, 2014) (finding that even if 20 members of Plaintiff were harmed by proposed rule, this was not a substantial number and therefore Plaintiff lacked standing; applying a more relaxed standard for standing than that applied to permit challenges).

In addition, permit challenges under Florida law require an extraordinary expenditure of funds, and the risk of mandatory fee awards, not present under federal law. Permit challenges under Florida law are not based on an administrative record, and, as a result, require challengers to expend large sums of money to retain expert witnesses and develop evidence. (Exhibits 16, 18, 19 and 20.) Litigation to seek a remedy for permit violations is even more fraught, as Plaintiffs would be subject to a mandatory attorney-fee shifting provision should they fail to prevail. Fla. Stat. § 403.412(2)(f). With the reduced deterrent effect of state law caused by the absence of criminal liability for negligent violations, more violations of state-issued 404 permits can be expected to occur. However, Plaintiffs will be deprived of access to the courts to hold permit violators accountable, which will irreparably harm Plaintiffs' ability to protect endangered species and enforce 404 requirements. (Exhibits 16, 18, 19, and 20.)

The inability to challenge unlawful permits, and to seek accountability for permit violations, undermines the Plaintiffs' ability to fulfill their missions, and access remedies to protect their institutional and members' interests. (Exhibits 16, 18, 19, and 20.) These are cognizable irreparable organizational harms. See NAACP v. USPS, 2020 WL 5995032 (D.D.C. Oct. 10, 2020) (finding that delay in mail ballots caused irreparable harm to organization that has civic engagement program designed to encourage citizens to be fully engaged in democratic process, and that defendant's actions making activities of the organization more difficult resulted in irreparable injury to Plaintiff).

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[11] See Fla. Home Builders Ass'n v. U.S. Dep't of Labor, 412 So.2d 351 (Fla. 1982); Farmworker Rights Org., Inc. v. Dep't of Health & Rehab. Servs., 417 So.2d 753, 754–55 (Fla. 1st Dist. Ct. App. 1982) (to establish associational standing under section 120.57(1) organization must demonstrate that "a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule," that "the subject matter of the challenged rule is within the association's general scope of interest and activity," and that "the relief requested is of a type appropriate for a trade association to receive on behalf of its members."); St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt., 54 So.3d 1051, 1054 (Fla. Dist. Ct. App. 2011) (under Florida APA, associational standing requires showing of harm to substantial interests of a substantial number of members; finding standing under sections 120.569 and 120.57 where organization had 1,500 members, including 50 in the relevant county, and that there had been more than 1,100 member participant ecological boat trips to the area); Friends of the Everglades, Inc. v. Bd. of Trustees of Int'l Imp. Tr. Fund, 595 So. 2d 186, 188 (Fla. Dist. Ct. App. 1992).

Lastly, absent preliminary relief, Plaintiff organizations will be deprived of rights and remedies available under the National Environmental Policy Act ("NEPA"), which does not apply to state-issued permits, during the pendency of this litigation. (Exhibits 16, 18, 19, and 20.) So long as the legality of the state program is in question, Plaintiffs should not be denied rights under NEPA, which are available while the program is administered by the Corps. (Id.) NEPA provides an essential opportunity to environmental advocates to participate in receiving, reviewing, submitting, and assessing information available to federal agencies before they issue a 404 permit. The same information is essential to assessing the lawfulness of the agency's ultimate action and may provide the underpinning for a challenge when federal requirements are not met. (Id.) Plaintiffs rely on the NEPA process to assess the risks to their organizational interests and missions, and to advocate for adequate protections to avoid or mitigate those risks. (Id.) Should they be denied access to the NEPA process during the pendency of this litigation, the Plaintiffs' ability to carry out their missions will be significantly impaired, causing irreparable harm. (Id.)

Being deprived of information that impairs Plaintiffs from implementing their mission constitutes irreparable harm. Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security, 387 F. Supp. 3d 33 (D.D.C. 2019) (Plaintiff, with mission to provide free and low-cost legal services to underserved immigrant children, was irreparably harmed by DHS's inability to link unaccompanied children to family members, which hurt ability of Plaintiff to provide advice and consult with clients). Not only do these harms perceptibly impair the work of Plaintiffs, but they also directly conflict with the missions of Plaintiffs. (Exhibits 16, 18, 19, and 20.) See League of Women Voters, 838 F. 3d at 8.

3. The Balance of Equities and Public Interest Favor Issuance of a Stay.

The Supreme Court has held that when there is environmental injury, the balance of harm favors preliminary relief because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." Amoco Prod. Co. v. Vill. of Gambell, AK, 480 U.S. 531, 545 (1987). Thus, the public has a strong interest in "preservation of the natural environment." Nat'l Wildlife Fed'n v. Andrus, 440 F. Supp. 1245, 1256 (D.D.C. 1977). This interest is particularly strong in this case where the impacts of development will be felt in some of the nation's most prized wetlands recognized for their incredible biodiversity and value in providing clean drinking water, storm resiliency, and economic value.

When weighing the balance of equities, it is imperative "to balance the competing claims of injury and the effect an injunction would have on each party." Fed. Maritime Comm'n v. City of Los Angeles, 607 F. Supp. 2d 192, 203 (D.D.C. 2009). Courts have looked to the harms that will befall the parties with or in the absence of a preliminary injunction, and whether such harms "would be certain and substantial." Sherley v. Sebelius, 644 F. 3d 388, 398-99 (D.C. Cir. 2011) (finding that balance of equities tilted against preliminary injunction where the Court was uncertain that the Plaintiffs would face a "significant additional burden" without the preliminary injunction, but the hardship imposed on others "would be certain and substantial").

EPA's approval of the state 404 program represents a radical departure from prior policy and practice and is ultimately inconsistent with federal law. The balance of equities weigh in favor of maintaining the status quo pending judicial review. This would allow the 404 program to continue to operate as it has for decades, a process to which the public and all affected parties are accustomed and which is consistent with federal law. The "primary purpose of a preliminary injunction is to preserve the object of the controversy in its then existing condition – to preserve the status quo." Aamer v. Obama, 742 F. 3d 1023, 1043 (D.C. Cir. 2014) (internal quotations omitted).

As demonstrated above, Plaintiffs in the pending litigation will suffer irreparable harm if a stay is not granted. Those harms are both substantive, affecting protection for listed species, and procedural, affecting the ability to challenge unlawful actions through an inadequate, and often inaccessible state judicial process. Here, EPA and the other interested federal agencies will only be required to maintain the status quo, continuing to administer the Section 404 program in Florida as they have for decades.

Issuance of a stay is also in the public interest because it would ensure the full protection of the Clean Water Act for wetlands and other waters of the United States in Florida that would otherwise be in jeopardy of irreparable harm through the permitting of dredge and fill under an inadequate and unlawful state program. It would also ensure protection of protected species that rely on those wetlands for feeding grounds, nurseries, and homes.

Beyond the interests of the Plaintiffs in the pending litigation, and those of the public writ large, a stay would also ensure that any permitting decisions impacting the sacred sites, cultural resources, and historic sites of tribes remain subject to the government-to-government consultation that is required when Section 404 is administered by the federal government, rather than a state.

Pursuant to EPA's consultation with tribes during its consideration of Florida's application, impacted tribes voiced significant concerns as to whether EPA's process complied with the trust responsibility imposed by NEPA, executive orders, and the National Historic Preservation Act. Some raised concerns that EPA conducted a hollow, lightning-speed consultation that (1) completely excluded two federally recognized tribes—the Seminole Nation of Oklahoma and the Jena Band of Choctaw Indians; (2) provided tribes *three business days* over a holiday weekend to review and comment on a draft programmatic agreement that did not include tribes as signatories; (3) adopted whole cloth a state-level memorandum of agreement created behind a curtain that excluded most tribes with rights in the state; and (4) applied a presumption that non-reservation lands are not "Indian Country" pursuant to 18 U.S.C. § 1151, unless proven otherwise. (Exhibits 21–24.) EPA's actions upended the longstanding federal-tribal consultation framework and left several substantive issues raised by the tribes unresolved.

By issuing a stay, EPA would ensure the rights of the tribes to engage in consultation on 404 matters affecting their interests pending resolution of the claims in this litigation. Menominee Indian Tribe of Wisconsin v. Envtl. Prot. Agency, 947 F.3d 1065, 1074 (7th Cir. 2020), reh'g denied (May 8, 2020). The tribal right to consultation is invaluable because damage to or destruction of any sacred lands or culturally significant sites would almost by definition

constitute irreparable harm. Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior, 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010); Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *19 (W.D. Okla. Sept. 23, 2008) (harm to project would "pale in comparison to the prospect of irreparable harm to sacred lands and centuries-old religious traditions which would occur absent injunctive relief"). For the Miccosukee Tribe of Indians of Florida, for example, "[t]he entire way of life of the Tribe and its members, including their cultural, religious, economic, and historical identity, is based upon the Everglades and upon the preservation of the Everglades in its natural state." (Exhibit 23; see also Exhibit 25 (explaining that state assumption "has placed several obstacles in the way of the Menominee Tribe in [its] efforts to protect [its] cultural, historic, and environmental resources currently under threat of impairment and destruction by the proposed state-permitted mine").)

Protection of these sacred sites also benefits the public because "[t]he importance of these sites transcends their spiritual value to the Tribes and, instead, evidences their cultural significance to the general public." Co. River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1440 (C.D. Cal. 1985). Moreover, if the transfer and operation of the state program goes ahead, the Tribes' legally protected procedural interest in consultation could effectively be lost. Quechan, 755 F. Supp. 2d at 1120. Tribes affected by Florida's 404 assumption application should not lose these important federal rights while the legality of that program approval remains in question, particularly in light of the tribes' stated, and unresolved, concerns with the state's application and EPA's consultation process.

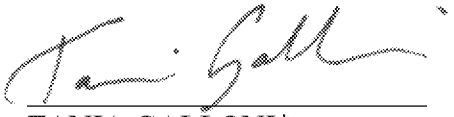
Lastly, there is a "strong public interest in meticulous compliance with the law by public officials." Fund for Animals v. Espy, 814 F. Supp. 142, 152 (D.D.C. 1993). See also Citizen's Alert Regarding the Env't v. U.S. Dep't of Justice, No. 95-CV-1702 (GK), 1995 WL 748246, at *12 (D.D.C. 1995) ("Issuance of a preliminary injunction here would thus directly serve the public interest by ensuring that federal agencies thoroughly consider the environmental consequences..."); Fund for Animals, 814 F. Supp. at 152 ("[A] public interest expressed by Congress was frustrated by approval of this proposal" without compliance with environmental law). In sum, there is "no question" that the public has an interest in having Congress' environmental mandates "carried out accurately and completely." Brady Campaign to Prevent Gun Violence, 612 F. Supp. 2d at 26.

In light of all the foregoing, the balance of the equities and public interest favor issuance of the requested stay.

Conclusion

For the reasons expressed above, Plaintiffs in the pending litigation respectfully request that EPA recognize that the transfer of authority was not lawful or, alternatively, if EPA lawfully promulgates a rule approving and codifying the state program, that the agency postpone its effective date. For the reasons stated in the Complaint, Plaintiffs further request that EPA initiate withdrawal of the approval in accordance with 33 U.S.C. § 1344(i).

Sincerely,



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